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IN THE

Supreme Court of the United States

October Term, 1957.

No. 529

WILLIAM KELLY,

Petitioner,

v.

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable Chief Justice, and the Associate Justices, of the Supreme Court of the United States:

WILLIAM KELLY, by his attorneys, respectfully petitions that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on May 16, 1957.

OPINION BELOW.

The opinion of the Court of Appeals is to be found in 245 F. 2d 408 (C. A. 3, 1957). This is the final judgment of the United States Court of Appeals reversing the judgment of, and remanding the case to, the United States District Court for the Eastern District of Pennsylvania with instructions to enter judgment for the defendant-appellant.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on May 16, 1957. A timely petition for rehearing was denied on July 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. Where a franchised common carrier by railroad in interstate commerce pursuant to contract knowingly permits and enables a manufacturing corporation, which owns and operates what it claims to be a private railroad without a common carrier railroad franchise, to connect the manufacturer's tracks with the franchised carrier's interstate tracks and consequently to operate in interstate commerce without having first complied with the legal requirement of obtaining a franchise to do so, and a railroad worker of the manufacturer is seriously injured as a result of the negligence of fellow employees in the course of their railroading duties, did not the franchised common carrier by operation of common law principles of tort law, followed universally in all state and federal courts, become liable as the employer of such manufacturer's injured railroad employee under the Federal Employers' Liability Act (45 U. S. C. § 51, *et seq.*)?

2. Does not the decision in this case violate the right of the Commonwealth of Pennsylvania to regulate within its borders those activities of all railroads which form part of the stream of interstate and intrastate commerce in Pennsylvania as to which Congress has not legislated?

THE STATUTE INVOLVED.

The Federal Employers' Liability Act, Act of April 22, 1908, C. 149, Sec. 1, 35 Stat. 65, as amended by the Act of Aug. 11, 1939, C. 685, Sec. 1, 53 Stat. 1404, 45 U. S. C. A. § 51 *et seq.*, the pertinent portion of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . ."

STATEMENT OF THE CASE.

On March 1, 1949, plaintiff, a laborer employed by the General Electric Company as a maintenance worker on its railroad in West Philadelphia, Pennsylvania (44a), was struck by a shifting engine owned by General Electric and operated by an engineman employed by General Electric (6a, 50a). The engineman was looking backward to get the signals instead of ahead in the direction in which he was moving (19a). He blew no bell or whistle (23a). He had a clear view; if he had been looking ahead he would have seen the plaintiff who was working on a switch. Plaintiff suffered the loss of his left arm and leg and other injuries when he was run down by the engine (25b).

The United States District Court for the Eastern District of Pennsylvania (Welsh, J.) entered judgment upon a jury verdict in favor of plaintiff. The Court of Appeals for the Third Circuit reversed and remanded the case to the District Court with instructions to enter judgment for the defendant-appellant. Plaintiff-appellee's petition for rehearing was denied and the present petition for certiorari followed.

There remains no factual issue pertaining to negligence or damages in this case. Nor is there any material dispute

concerning the facts surrounding the only question remaining in this case, namely, the legal question of whether defendant-respondent, the Pennsylvania Railroad, is responsible as a matter of law, or at least as a question of fact, as "employer" to plaintiff within the purview of the Federal Employers' Liability Act for the injuries sustained by him as a result of the negligent conduct of his fellow employees similarly employed.

The relevant facts are these: General Electric is not incorporated as a railroad company or franchised to operate a railroad (106a). General Electric has operated a railroad in West Philadelphia. This unfranchised railroad does the work of an interstate carrier by rail pursuant to contractual arrangements with and the authorization, permission, and cooperation of the Pennsylvania Railroad Company. It has direct connections with the Pennsylvania Railroad tracks. Indeed, the Pennsylvania Railroad had for thirty years moved cars on General Electric's "private" tracks on occasions when the Railroad's interchange tracks were full (41a, 96a-97a).

All of the tracks in the General Electric Company yard were constructed pursuant to private ordinances passed by the City Council of Philadelphia on July 12, 1923, and July 23, 1924. These ordinances granted only to the *Pennsylvania Railroad Company* permission "to construct, operate and maintain" at first two tracks and later four additional tracks across a public highway known as 68th Street "to and into" the General Electric plant. 68th Street at that point had been officially and formally dedicated to the City of Philadelphia (124b-128b). Only a public utility may lay tracks on a public highway in Pennsylvania.

South of the main tracks of the Pennsylvania Railroad is a fence known as the General Electric fence. It is on land owned by The Pennsylvania Railroad Company. There is a gate in this fence through which cars coming off the main line of the Pennsylvania Railroad must pass

to get into the General Electric railroad yard in question. The key to the gate in this fence is in the exclusive custody and control of the Pennsylvania Railroad conductor (45a).

General Electric at the time of the accident operated and maintained in West Philadelphia a railroad consisting of approximately two and one-quarter miles of trackage (89a), two diesel engines and a number of freight cars (88a). It hired its own train crews which sometimes operated under the direction and control of its own supervisors (88a, 97a) and at other times under the direction and control of the regular Pennsylvania Railroad crew (41a-42a). General Electric with its own equipment weighed its outgoing freight shipments (136a) for the Pennsylvania Railroad's billing purposes, thus performing part of the work for which the Pennsylvania Railroad was paid under its tariff charge, (94a-95a).

Plaintiff's duties were in the General Electric railroad yard where he cleaned up debris, kept the switches oiled and working, and looked for loose bolts on railroad ties (44a). At the moment of the accident he was correcting a switch across which, among others, a loaded car was to be moved to be weighed on General Electric's scales (136a), a non-delegable duty of the Railroad for which it was paid under its tariff charge. There was an agreement between the Pennsylvania Railroad and General Electric, dated May 14, 1925, providing, *inter alia*, for the connection of General Electric's tracks with those of the Pennsylvania Railroad (181a-189a). Secondly, there is the contractual arrangement between the Railroad and General Electric whereby (1) the Railroad daily delivers freight cars, both loaded and empty, to and removes outbound cars from, the General Electric interchange tracks and (2) General Electric daily moves these cars to various points on its yard tracks and interchange trucks, outbound on the initial stage of their interstate journey and inbound on the final leg of their interstate journey under Pennsylvania Railroad

tariffs (28a-31a, 37a, 41a, 93a-94a). For all of this the Pennsylvania Railroad was paid (120a-122a).

In paragraph Third of the Agreement of 1925 General Electric promised to comply with all state and federal statutes and regulations. This it failed to do, as is shown *infra*. Paragraph Third reads (182a-183a):

> "Third: The Industry will secure and assume the expense of securing and complying with any necessary ordinance, order, permit, or consent from any public authority for the construction, maintenance, and operation of the said side-track. The Industry agrees that it will, at its own expense, provide any bond required by such public authority and will also assume any tax, assessment, or license fee now or hereafter levied because of the occupancy of any public property or thoroughfare by the said side-track. The Industry further agrees that the provisions of State and Federal statutes, as well as the rules, regulations, and requirements of the Interstate Commerce Commission, or of the appropriate State Commission, with respect to the construction, maintenance, and operation of the Industry's said side-track, shall be complied with."

REASONS FOR GRANTING THE WRIT.

1. This decision denies to a substantial segment of railroad employees engaged in interstate commerce the benefits provided by the F. E. L. A. in cases where a franchised interstate common carrier permits an unfranchised private railroad to connect with its interstate lines, knowing that the private railroad has failed to obtain a common carrier railroad franchise as required by State Constitution and statute.

2. This decision rejects the universally accepted rule (A. L. I., Restatement, Torts, § 428) that a publicly fran-

chised carrier is by operation of law responsible for the negligent conduct of an unfranchised private carrier, where the franchised carrier permits and enables the private carrier to perform activities which may be lawfully carried on only under a public franchise; and this is so even though such parties may be independent contractors as between themselves.

3. This decision permits the respondent, a franchised common carrier by railroad, to delegate legally non-delegable franchise duties to an unfranchised private connecting railroad and at the same time avoid its responsibility to the latter's employees imposed by the F. E. L. A.

4. This decision permits a private railroad to connect with the lines of an interstate common carrier and to operate as an independent contractor without a common carrier railroad franchise, in violation of the Constitution of Pennsylvania, Article 17, § 1 and the Pennsylvania Act of April 15, 1851, P. L. [1852] 720, § 7, 67 P. S. § 363.

5. This decision is in conflict with the decision of this Court in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 34 S. Ct. 305 (1914).

6. This decision is in conflict in principle with the decision of the same Court of Appeals (Third Circuit) in *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400. (C. A. 3, 1945).

7. This decision violates the right of a State to regulate those phases of interstate commerce by railroad within its borders as to which Congress has not exercised its constitutional supremacy.

ARGUMENT.

I. In the Circumstances Here Involved the Pennsylvania Railroad Company Is as a Matter of Law Under the Federal Employers' Liability Act Liable to All Railroad Employees of the General Electric Company Engaged in the Furtherance of Interstate Commerce, and to Plaintiff in Particular, Injured Through the Negligence of the General Electric Company in the Operation of Its Private Connecting Railroad.

Petitioner Kelly lost two limbs and suffered other injuries as a result of being run down by a railroad engine while he was working on a railroad switch. At the time of the accident Kelly was employed as a railroad worker in the furtherance of interstate commerce on General Electric Company's private intra-plant railroad in West Philadelphia, Pennsylvania. In its railroad operation General Electric was unquestionably engaged in interstate commerce, as is demonstrated later in this petition.

Kelly brought an action against General Electric under the Federal Employers' Liability Act, cited *supra*, in which summary judgment was entered against him on the stated ground that the circumstances of General Electric's railroad operation did not make it a "common carrier" within the purview of the Act. *Kelly v. General Electric Company*, 110 F. Supp. 4 (E. D. Pa. 1953), aff'd per curiam 204 F. 2d 692 (C. A. 3, 1953), cert. den. 346 U. S. 886, 74 S. Ct. 137 (1953).

Kelly also brought the present action against the Pennsylvania Railroad Company in which he was awarded a substantial jury verdict in the District Court for the Eastern District of Pennsylvania. The judgment entered on that jury verdict amply supported by the record was reversed by the Court of Appeals for the Third Circuit principally on the ground that the Pennsylvania Railroad Company was as a matter of law not Kelly's employer. The Court of Appeals peremptorily and, we submit, errone-

ously overruled our alternative position which became the sole contention in Kelly's petition for rehearing in the Court below and is presently the only question we raise before this Court. Our contention is this:

A. It Would Have Been Illegal for General Electric Company to Connect With the Pennsylvania Railroad Company's Tracks and to Operate Its Connecting Railroad Without a Franchise From the Commonwealth of Pennsylvania, Unless General Electric Under Applicable Law Is Considered to Have Acted as the Pennsylvania Railroad's Agent in the Performance of Those Activities.

We would like to make absolutely clear that it is not our position that General Electric committed an unlawful act in connecting its tracks with those of the Pennsylvania Railroad and in operating a "private" interstate connecting railroad without a franchise from the state. Nor is it our contention that the Pennsylvania Railroad acted unlawfully in permitting and facilitating this connection and operation by General Electric. What we are contending is that General Electric's conduct can be construed in two ways, one lawful and the other unlawful. And, as the Supreme Court of Pennsylvania has repeatedly held, " 'If specified conduct, in one view, may be construed to be lawful, and in another, to be unlawful, the lawful construction shall be adopted: *Rau v. Wilkes-Barre & E. R. R. Co.*, 311 Pa. 510, 513, 167 A. 230; *Morgan v. Heinel Motor, Inc.*, 329 Pa. 360, 364, 197 A. 920; *Kimbel v. Wilson*, 352 Pa. 275, 42 A. 2d 526." *Kissell v. Motor Age Transit Lines*, 357 Pa. 204, 53 A. 2d 59[illegible] (1947).

This pronouncement was spelled out even more fully in the case of *Rau v. Wilkes-Barre & E. R. R. Co.*, 311 Pa. 510, 167 A. 230 (1933), where the Court said at page 513:

". . . but it is well settled that if conduct and words, said to be ambiguous, are susceptible of a lawful inter-

pretation and also of one that is unlawful, *the lawful interpretation must be accepted and applied:* (Citations). . . ." (Emphasis ours.)

This presumption is not unique in the laws of Pennsylvania. It is fundamental to the law of the land.

The Supreme Court of the United States said in *Cincinnati, N. O. & T. P. R. Co. v. Rankin,* 241 U. S. 319, 36 S. Ct. 555, 558 (1916):

". . . It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and, in respect of transactions in the ordinary course of business, it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved, it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniture esse acta, donec probetur in contrarium*' . . ."

If General Electric's railroad operations were construed to create for it the relationship of independent contrator with the Pennsylvania Railroad, those operations, being unfranchised, would be unlawful (as is demonstrated *infra*).

We shall see, however, that the applicable rule of tort law considers General Electric's railroad operations as lawful conduct by an agent on behalf of the Pennsylvania Railroad, a duly franchised common carrier by railroad in interstate commerce. The action of General Electric in undertaking the transportation movement of the car which struck plaintiff must be considered as that of an

agent acting on behalf of the Pennsylvania Railroad. It is undisputed that a carrier is liable for the negligence of an agent's or a licensee's employees under the Federal Employers' Liability Act. *Kansas City Southern Ry. Co. v. Nectaux*, 26 F. 2d 317 (C. C. A. 5, 1928), cert. den. 278 U. S. 621, 49 S. Ct. 24 (1928).

This is not a case where the doctrine of independent contractor is applicable. By virtue of its franchise as a common carrier by railroad, the Pennsylvania Railroad knowingly and deliberately permitted and enabled General Electric to connect its tracks with the Pennsylvania Railroad's interstate tracks and to operate its "private" railroad without a franchise required by State law, as is shown *infra*. General Electric in the performance of those franchise activities without a franchise and with the permission and full cooperation of the Pennsylvania Railroad, a franchised common carrier, must be treated as an *agent* of the Pennsylvania Railroad under common law. General Electric's railroad employees, including plaintiff, engaged in the furtherance of interstate commerce are therefore the Pennsylvania Railroad's "employees" within the meaning of the Federal Employers' Liability Act. Respondent Railroad is liable for injuries received by plaintiff as a result of the negligence of his fellow employees, also Pennsylvania Railroad "employees" within the meaning of the F. E. L. A.

In short, General Electric at the time Kelly received his injuries was doing Pennsylvania Railroad work, that is, performing duties under and by virtue of the Railroad's franchise. The negligent performance by General Electric of the Railroad's non-delegable franchise duties imposed liability upon the Railroad as an "employer" within the meaning of the F. E. L. A.

The Constitution and statutory law of Pennsylvania clearly make it unlawful for an independent contractor in Pennsylvania to connect its private tracks with those of

an interstate carrier without first having obtained a common carrier railroad franchise from the Commonwealth.

Article 17, Section 1 of the Constitution of Pennsylvania, provides that "*all railroad and canal companies shall be common carriers*" and that "*any association or corporation organized for the purpose [operating a railroad] shall have the right* to construct and operate a railroad between any points within this State, and to connect at the State line with railroads of other States . . . [and] *to connect with . . . any other railroad.*" (Emphasis supplied). The clear implication of this constitutional provision is that any railroad company *not* incorporated as a common carrier railroad shall *not* have the right to connect with common carrier railroads. This implication was made explicit by the Pennsylvania Act of 1851, April 15, P. L. [1852] 720, § 7, 67 P. S. § 363,[1] which declares unlawful and absolutely prohibits the connection of private railroads with common carrier railroads and, conversely, the connection of common carrier railroads with private railroads. The obvious purpose of the Pennsylvania Constitutional provision and statute in requiring all private railroad companies to incorporate as common carrier railroads as a condition precedent to their being legally permitted to connect with franchised common carrier railroads was to subject *all* railroads within the Commonwealth to uniform regulation.

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1. "CONNECTION OF PRIVATE WITH PUBLIC RAILROADS PROHIBITED it shall not be lawful for any private individual, or association of individuals, or any company or companies, to construct a private railroad connecting with any railroad authorized to be constructed by the laws of this state, with the Ohio and New York state lines, or with any railroad constructed or to be constructed in the States of Ohio and New York; and it shall not be lawful for any railroad company authorized by the laws of this state to connect with any such private railroad; and any violation of the provisions of this act shall subject all individuals or association of individuals violating the same, to the jurisdiction of the courts of this state, and to such forfeiture as the legislature may hereafter direct. (1851, April 15, P. L. [1852] 720, § 7.)"

We submit that the Court of Appeals was in error in holding impliedly (Appendix, pp. 4a-5a, *infra*) that notwithstanding the specific language of the Act of 1851, cited *supra*, it was lawful for the General Electric Company *as an independent contractor* to connect with the Pennsylvania Railroad's tracks. We do not dispute the Court of Appeals' statement that "Both Pennsylvania Statutes [citing, in footnote 2, Pa. Stat. Ann. tit. 66, § 1176 (Purdon 1941)]; *Id.* tit. 67, § 472, § 781 et seq. (Purdon 1930) and the federal Interstate Commerce Act [citing, in footnote 3, 49 U. S. C. A. § 1(9)] recognize the existence of lateral railroads and private sidetracks and require common carriers to connect with them.'" (Appendix, p. 5a, *infra*). But it is perfectly obvious from a reading of these statutes cited by the Court of Appeals and the cases decided thereunder that they are irrelevant to the problem of the right of a connecting railroad to operate and maintain its own engines, rolling stock, and other railroad equipment with its own crews on its own tracks *without first having incorporated as a railroad company and hence without having subjected itself to the rules and regulations of the Pennsylvania Public Utilities Commission, the Interstate Commerce Commission and the several Federal Statutes governing interstate railroads and particularly the Federal Employers' Liability Act.* The statutes cited in footnotes 2 and 3 of the Court of Appeals' opinion (Appendix, p. 5a, *infra*), merely require common carrier railroads to construct, maintain and operate switch connections with commercial sidings, that is, shippers' side tracks, where there will be sufficient business to justify the furnishing of such connection and service by the common carrier. These statutes merely order the extension of the *common carriers'* facilities into private plants. *They do not authorize and do not refer or apply to the engagement by an industry in the operation of its private railroad*, including the operation and maintenance of railroad engines and roll-

ing stock and the employment of train crews and other railroad workers. It should not require argument to establish our point that merely owning and maintaining a sidetrack or a lateral railroad track by an industry does not put that industry in the railroad business; but the operation of a complete self-contained, private connecting railroad in interstate commerce by the General Electric Company does put General Electric in forbidden railroad business unless it is acting as the agent of the Pennsylvania Railroad.

The Commonwealth of Pennsylvania has attempted to subject to regulation all railroads within its borders, both public and private, by the above cited constitutional provision. In order to compel private railroads to incorporate as common carrier railroads and thereby subject themselves to State regulation, Pennsylvania has prohibited and declared unlawful the *connection* of private railroads not incorporated (or franchised) as common carrier railroads (such as General Electric's unfranchised railroad) with franchised common carrier railroads (such as the Pennsylvania Railroad). General Electric, in violation of the Constitution (Article 17, Sec. 1) of Pennsylvania and the Act of 1851, cited *supra*, has failed to obtain a franchise to operate its private connecting railroad either by amending its own corporate charter or by forming a subsidiary railroad corporation.

There is no question that if General Electric Company or a subsidiary thereof *had* incorporated as a railroad company, as it was legally required to do under the above-cited Pennsylvania constitutional and statutory provisions, for the purpose of operating its intra-plant railroad directly connecting with the tracks and facilities of the Pennsylvania Railroad, General Electric or its subsidiary would have to be considered a common carrier by railroad in interstate commerce both under the Constitution of Pennsylvania and within the purview of the Federal Employ-

ers' Liability Act. Constitution of Pennsylvania, Article 17, § 1; *Kach v. Monessen Southwestern Ry. Co.*, 151 F. 2d 400 (C. A. 3, 1945).

In *Kach* defendant's operation was largely confined to the movement of freight cars into and out of the works of the steel company, of which defendant was a wholly owned subsidiary. These movements constituted a portion of the trip of carloads of freight which had been definitely committed to an interstate journey. Judge Maris in that case clearly stated the rule of law which is also applicable to the present case (151 F. 2d at 401-402):

> "We think that the facts thus disclosed establish that the defendant railroad is engaged in interstate commerce within the meaning of the acts upon which the plaintiff relies. The fact that the defendant railroad does not itself transport consignments of freight across state lines does not place it beyond the reach of the federal power under the commerce clause of the Constitution. Const. art. 1, § 8, cl. 3. If it takes part with other carriers in the continuous movement of a consignment of freight which passes across a state line at some point in its journey between the place of origin and the place of destination it becomes a participant in interstate commerce and, therefore, subject to the power of Congress under the commerce clause of the Constitution. The evidence, as we have seen, discloses that the defendant does exactly that.
>
> "Although the defendant's operation is largely confined to the movement of cars into and out of the Steel Company's works it nonetheless does move for a portion of their trip carloads of freight which have been definitely committed to an interstate journey. Compare Philadelphia & R. R. Co. v. Hancock, 1920, 253 U. S. 284, 40 S. Ct. 512, 64 L. Ed. 907. It is in this respect that the case is distinguishable from McCluskey v. Marysville N. R. Co., 1917, 243 U. S. 36, 37 S. Ct.

374, 61 L. Ed. 578, relied upon by the defendant. In view of the fact that the defendant does physically participate in a portion of the interstate movement of consignments of freight it becomes wholly unimportant that it does not itself publish tariffs or participate in the tariff charges of its connecting railroads."

The facts pertaining to the question of interstate commerce in the present case are strikingly similar to those in the *Kach* case. In both cases defendants received cars loaded with materials from the connecting interstate railroads, moved those cars to appropriate points in the plant works on the last leg of their interstate journey, and initiated shipments in interstate commerce by loading and moving cars to the connecting common carrier railroads. The only difference between the *Kach* case and the present one is that the manufacturer in *Kach* had duly organized a subsidiary railroad corporation, the Monessen Southwestern Railway Company, to operate a private intra-plant railroad *connecting* with common carriers, as it was required to do under the law of Pennsylvania (Constitution of Pennsylvania, Article 17, § 1; Act of 1851 April 15, P. L. [1852] 720 § 7); but the manufacturer in the present case (General Electric Company) in clear violation of the above-cited law of Pennsylvania failed to incorporate itself or a subsidiary as a railroad company for the purpose of engaging in activities which resulted, inter alia, in the accident now in question.

Shaw v. Monessen Southwestern Ry. Co., 200 F. 2d 841 (3d Cir. 1953) on which the Court below relied heavily in the present case, is clearly not in point with the present case: The *Shaw* case merely involves the question of whether plaintiff was an employee of the Pittsburgh Steel Company or its wholly owned subsidiary, the Monessen Southwestern Railway Company. If General Electric had organized a subsidiary intra-plant railroad corporation,

then perhaps we might have been presented with a problem analogous to the one in the *Shaw* case, namely, whether the plaintiff was an employee of General Electric or its subsidiary railroad corporation at the time of the accident. But in the present case General Electric, itself, and not through a subsidiary, has engaged in railroad activities identical to those performed by the Monessen Railway in the *Shaw* case and, of course, in the *Kach* case. The tests for employment of one person by another, listed in the *Shaw* opinion and repeated in the opinion in the present case, are completely irrelevant to the question now before this Court, which is: Whether the Pennsylvania Railroad, as a result of its authorization, permission and facilitation of General Electric's operating a connecting railroad without a franchise is to be considered General Electric's employer and therefore plaintiff's employer for purposes of the Federal Employers' Liability Act under the well-established principles of tort law discussed below.

B. Under the Applicable Common Law Rule General Electric Is Considered an Agent of the Pennsylvania Railroad and the Latter Is Subject to Liability as an "Employer" Within the Meaning of the F. E. L. A. to a Railroad Employee of General Electric Injured While Engaged in the Furtherance of Interstate Commerce as a Result of the Negligence of Fellow General Electric Railroad Employees.

1. We are not here advancing the contention that plaintiff was a "borrowed servant" of the Pennsylvania Railroad Company. We are assuming *arguendo* that he was in fact an employee of General Electric under the tests stated in *Shaw v. Monessen Southwestern Railway Company, supra.* Our contention is that under the well-established common law rule of tort law (Restatement, Torts, Sec. 428), *the Pennsylvania Railroad is subject to liability*

for bodily harm caused to plaintiff by the negligence of his fellow General Electric railroad employees just as though plaintiff had been in fact employed by the Pennsylvania Railroad.

Section 428 of the Restatement of Torts reads as follows:

> "§ 428. Contractor's Negligence in Doing Work Which Cannot be Lawfully Done Except Under a Franchise Granted to his Employer.
>
> "An individual or a corporation carrying on an activity which can be lawfully carried on only under a franchise granted by public authority and which involves an unreasonable risk of harm to others, is subject to liability for bodily harm caused to such others by the negligence of a contractor employed to do work in carrying on the activity. . . ."

Section 428, in imputing the negligence of an independent contractor to the "employer" thereof, in juristic terms is designating the independent contractor as a constructive agent with regard to the performance of the non-delegable duties of the employer.

The general principle recited in Section 428 seems to be that "where public authority grants to an individual or corporation authority to engage in certain activities involving danger to the public, which right is denied to the general public, the duty to safeguard the public while performing such franchise activities, is legally non-delegable, and *the franchise holder is therefore responsible for the conduct of those whom it permits to act under its franchise, even though such persons be independent contractors.*" *Hodges v. Johnson*, 52 F. Supp. 488, 491 (W. D. Va. 1943). (Emphasis supplied) Accord: *Venuto v. Robinson*, 118 F. 2d 679 (C. A. 3, 1941); *Rosu v. Law*, 193 F. 2d 894 (C. A. 3, 1952); *Kissell v. Motor Age Transit Lines*, 357 Pa. 204, 53 A. 2d 593 (1947); see also Anno. "Independent Con-

tractor—Positive Duties", 28 A. L. R. 122-197; cf. *Atlantic Coast Line R. Co. v. Tredway,* 120 Va. 735, 93 S. E. 560 (1917), cert. denied 245 U. S. 670, 38 S. Ct. 191 (1918) where, in effect, an employee of defendant railroad's independent contractor performing a non-assignable duty of defendant was held to be defendant's "employee" within the meaning of the F. E. L. A.

We submit that the above-stated general rule of imputed negligence is directly applicable to the factual situation of the relationship between the Pennsylvania Railroad and General Electric in the present case for the following reasons: (1) General Electric had no franchise to operate its "private" railroad on which the accident in question occurred. (2) It would have been illegal for General Electric to connect its tracks with those of the Pennsylvania Railroad and to operate its private connecting railroad as an independent contractor without a franchise. (3) The Pennsylvania Railroad, a franchise holder, permitted and enabled General Electric to perform "franchise activities" without a franchise (i.e., move goods in interstate commerce by railroad), "which involves an unreasonable risk of harm to others". Therefore, the law treats General Electric as an agent of the Pennsylvania Railroad and subjects the Railroad to responsibility for General Electric's negligent conduct in its railroad operations.

The freight movements on the General Electric tracks constituted the initial or final phases of shipments in interstate commerce. It was the duty of the Pennsylvania Railroad, at General Electric's request, to make as many placements of cars in and around its plant as General Electric require[2] However, for the sake of its own convenience

2. Under the regulations of the Interstate Commerce Commission an industry is entitled to one free placement of cars per day (124a). This includes movements up to and from the loading platforms themselves, even though cars are taken out of the middle of a draft on the inbound tracks (122a). It was such a movement here involved. It was the Pennsylvania Railroad's work which was being done.

and economy, General Electric entered into an arrangement with the Railroad, described *supra*, whereby General Electric handled the initial and terminal phases of its own interstate freight movements *without a franchise*. Indeed on some occasions it moved cars in which less than carload lots were consigned to General Electric and the remaining portion of the freight was consigned to someone else (100a-101a). Only a common carrier could properly be performing that movement.

The Pennsylvania Railroad permitted and enabled General Electric to operate its "private" intra-plant railroad under and by virtue of the Railroad's own franchise. The duty of the Railroad to safeguard third persons "while performing such franchise activities is legally nondelegable, and the franchise holder [the Pennsylvania Railroad] is therefore responsible for the conduct of those whom it permits to act under its franchise [here, General Electric], even though such persons be independent contractors." *Hodges v. Johnson, supra.* Under the common law rule restated in Section 428 of the Restatement of Torts and applied by all the state and federal Courts, the Pennsylvania Railroad as franchise holder is liable to third persons, including, as we shall show *infra*, employees of General Electric, for the negligent acts of General Electric through its railroad employees in the unfranchised operation of its railroad.

In *Kissell v. Motor Age Transit Lines, supra*, at the time of its collision with defendant's truck, a tractor owned by Direct Transportation Company was being operated by plaintiff's decedent. The tractor was drawing a trailer owned by Lyons Transportation Company, Inc. Asserting that Direct was an independent contractor, Lyons contended that the trial judge erred in charging the jury that if it found that plaintiff's decedent, the driver of Direct's tractor, was negligent and his negligence was a contributing cause of the accident, Lyons was liable as a matter of law. The Supreme Court of Pennsylvania held (357 Pa. at 209):

"The shipment by Lyons was an interstate shipment by a public carrier for which Lyons had an Interstate Commerce Commission permit. Direct had no such franchise. Without this permit, the transportation could not legally have been furnished. Lyons could not transfer its responsibility and liability to one who did not have such certificate. To permit this to be done would render ineffective the requirements of the Federal Motor Carrier Act and regulations based thereon. The relationship of independent contractor whereby Direct was to carry the shipment in question and assume responsibility and liability could not validly be created: Kimble v. Wilson, supra, 281-282; Pennsylvania R. R. Co. v. Cameron, 280 Pa. 458, 466, 124 A. 638. The charge of the trial judge, that if Reed was negligent and that negligence was a contributing cause, then, as a matter of law, Lyons was also negligent, was proper."

2. We shall presume to state the question which we believe will immediately arise in the minds of the Honorable Justices of this Court: Since this action was brought under a federal statute, the F. E. L. A., would it be proper to apply the general common law rule of tort law and vicarious liability discussed *supra*, which is observed in the State Courts of Pennsylvania, which is also the forum, the locus of the accident and the place where the contract between Pennsylvania Railroad and General Electric was made, in order to bring the parties within the coverage of the Federal Act? Fortunately, this Court has already decided this point in the affirmative in the analogous case of *North Carolina Railroad Company v. Zachary*, 232 U. S. 248, 34 S. Ct. 305 (1914), cited with approval in *Southern Railroad Co. v. Lloyd*, 239 U. S. 496, 500, 36 S. Ct. 210, 211 (1916), and distinguished in *Hull v. Philadelphia & R. Ry. Co.*, 252 U. S. 475, 480, 40 S. Ct. 358, 360 (1920).

This Court in its opinion in *Chesapeake and O. Ry. Co. v. Stapleton*, 279 U. S. 587, 591, 49 S. Ct. 442, 443 (1929) summarized the holding in *Zachary* as follows:

> "In *North Carolina Railroad v. Zachary*, 232 U. S. 248, 34 S. Ct. 305, 58 L. Ed. 591, the action was brought in a state court of North Carolina to recover damages for the negligent killing of a locomotive fireman of the Southern Railway Company, lessee of the defendant. Under the law of the state, the North Carolina Railroad, as lessor of the Southern Railway Company, was held responsible for all acts of negligence occurring in the conduct of business upon the lessor's road, and its liability was extended to employees of the lessee, injured through the negligence of the latter. The state Supreme Court held that the Federal Employers' Liability Act did not apply. This Court, reversing that Court, held that the Federal Employers' Liability Act did apply to the case, and that the case should be submitted to the jury on the issue whether the fireman was engaged in interstate commerce at the time of death."

In *North Carolina Railroad Company v. Zachary*, the Court stated (232 U. S. 248, 258, 34 S. Ct. 305, 308):

> "The Court based its decision that the Federal act did not apply, in part upon the ground that the North Carolina Railroad is not an interstate railroad,—its tracks and property lying wholly within the state,—and that the corporation itself is not, although its lessee is, engaged in interstate commerce; the lessor's activities being confined to receiving annual rents and distributing them among its stockholders. The responsibility of the lessor for all acts of negligence of the lessee occurring in the conduct of business on the lessor's road, as established by the same court in *Logan v. North Carolina R. Co.*, 116 N. C. 941, 21 S. E. 959, was recognized—indeed, reasserted. But, it was said that

is because a railroad corporation cannot escape its responsibility by leasing its road. It is still liable for its lessee's acts of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either." [156 N. C. 500, 72 S. E. 858.]

"It is plain enough, however, that the effect of the rule thus laid down, especially in view of the grounds upon which it is based, is, that although a railroad lease as between the parties may have the force and effect of ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, *including employees as patrons*—constitutes the lessee the lessor's substitute or agent, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation under the local law, it seems to us that it must and does result, in the case before us, that the lessor is a 'common carrier by railroad, engaging in commerce between the states', and that the deceased was 'employed by such carrier in such commerce', within the meaning of the Federal act; provided, of course, he was employed by the lessee in such commerce at the time he was killed." (Emphasis supplied.)

The *Zachary* case establishes the rule that the law of the State where the accident occurs determines whether a defendant common carrier railroad in interstate commerce is subject to the responsibility of an employer to an injured railroad worker under the Federal Employers' Liability Act or, otherwise stated, whether the injured railroad worker is "employed by such carrier in such commerce"

within the meaning of the Act. *Certainly if the F. E. L. A. by virtue of a State statute includes the liability of a lessor interstate common carrier railroad to an employee of its lessee intrastate railroad injured as a result of the negligence of the latter, the F. E. L. A. likewise includes within its coverage the liability of an interstate common carrier railroad (the Pennsylvania Railroad) to a railroad employee of an unfranchised private interstate railroad company (General Electric) injured as a result of the negligence of the latter, by virtue of a universally followed common law rule of vicarious liability made applicable by the provisions of a State Constitution and statute.*

We submit that the present question is one of equal national importance with the question raised in the *Zachary* case: If within the purview of the Federal Employers' Liability Act a lessor cannot evade responsibility to a lessee's railroad employee created by State law, *a fortiori* a franchise holder should not be permitted to escape responsibility to the employee of an independent contractor it has permitted and enabled to operate a private connecting railroad in interstate commerce without a franchise.

We submit, therefore, that the decision of the Court of Appeals for the Third Circuit that the Pennsylvania Railroad was not subject to liability as an employer to plaintiff under the F. E. L. A. pursuant to the State constitutional provision and statute and common law (Restatement) rule cited *supra*, is in direct conflict with the decision of this Court in *North Carolina Railroad Company v. Zachary*, *supra*, and, therefore, that the Court of Appeals decision is erroneous as a matter of law. *The opinion of the Court below never met the real issue of law in the case.*

We further submit that the Court of Appeals has "decided an important state . . . question in a way in conflict with applicable state . . . law" (Rule 19(a), Revised Rules of the Supreme Court of the United States), for the foregoing reasons and for the additional reasons set forth *infra*.

II. The Decision of the Court of Appeals in Effect Exempts an Unfranchised Connecting Railroad From State Regulation as Well as From Responsibility Under the Federal Employers' Liability Act.

The Court of Appeals, we submit, had available but two alternative modes of deciding the appeal below: either (1) by construing General Electric's railroad activities as the lawful conduct by an agent of a duly franchised carrier within Section 428 of the Restatement of Torts or (2) by construing General Electric's railroad operations as the unlawful conduct of an independent contractor, Section 428 to the contrary notwithstanding. The Court of Appeals chose neither alternative; it instead held by implication that the Act of 1851 is ineffective (Appendix, pp. 4a-5a, *infra*), despite its plain, unequivocal language. Respondent has attempted to oppose our position with the extremely weak argument that "It is difficult to understand just what the statute [of 1851] cited does mean. . . ." (Appellant's Reply Brief, p. 5.) It admits the statute has never been repealed.

The Commonwealth of Pennsylvania clearly has the right to regulate those phases of interstate railroad operation occurring wholly within its borders as to which Congress has not exercised its constitutional supremacy. *Turner v. State of Maryland*, 107 U. S. 38, 2 S. Ct. 44 (1883).

The State has attempted to compel all private railroads connecting with common carriers in interstate commerce to obtain franchises to operate as common carrier railroads in order that such private railroads may be subject to regulation by the State.

The Pennsylvania Railroad, knowing that General Electric was not a franchised carrier, obtained the passage of city ordinances to cross 68th Street with its tracks and otherwise cooperated with General Electric in connecting their tracks and in enabling General Electric to carry on franchise activities in the operation of its railroad in in-

terstate commerce. The Railroad protected itself against possible liability resulting from negligent acts done by General Electric in the operation of its "private" railroad by indemnification provisions contained in paragraph Eighth of the May 14, 1925 agreement.[3] The Pennsylvania Railroad in paragraph Third (p. 6, *supra*), of the same agreement required General Electric to abide by all rules, regulations and orders, both state or federal, which the several regulating bodies might impose on it in connection with this General Electric operation, on threat of disconnection of the track and reimbursement of expenditures made by the Railroad if General Electric failed to comply. *All these prove that the Pennsylvania Railroad knew ab initio, from the day it agreed to this connection by General Electric with its tracks, that it was liable for all General Electric's operations as though it, the Pennsylvania Railroad itself, was performing them.* The Pennsylvania Railroad permitted General Electric to weigh its own outgoing freight (136a) for the Railroad's billing purposes. Ascertaining the weight of the freight carried by a common carrier is a non-delegable duty of the carrier. See I. C. C. Report No. 30556, dated January 3, 1955.

General Electric in the operation of its West Philadelphia railroad was doing Pennsylvania Railroad work, albeit for General Electric's own convenience and economy, without the burden of being subject to State and Federal regulation. The Pennsylvania Railroad by virtue of its arrangement with General Electric will have had the benefit of the performance of its non-delegable franchise duties

3. "Eighth: * * * The Industry also agrees to indemnify, and hold harmless the Railroad Company for loss, damage, or injury from any act or omission of the Industry, its employees, or agents, to the person or property of the parties hereto and their employees, and to the person or property of any other person or corporation, while on or about said side-track; and if any claim or liability, other than from fire, shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally." (184a-185a).

by General Electric railroad employees without the correlative responsibility under the F. E. L. A. to those employees injured as a result of the negligent performance by General Electric of such common carrier duties, unless the judgment of the court below is reversed.

We submit that the applicable rule of law is clear and that there is no law to the contrary. The District Court was correct in submitting the issue of the Pennsylvania Railroad's liability to the jury. As a fact issue, only the jury has the power to pass on it.

CONCLUSION.

The judgment of the Court of Appeals for the Third Circuit in the case at bar is predicated on a serious error of law. The decision below is in direct conflict with the decision of this Court in the *Zachary* case, *supra*. We earnestly submit that State policies in regard to the imposition of responsibility for negligent injuries to railroad employees upon corporations other than their actual employers should be upheld and enforced by the courts in their application of the Federal Employers' Liability Act, as was done by this Court in *Zachary*.

This petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

B. Nathaniel Richter,
Theodore H. Lunine,
Richter, Lord & Levy,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,074

WILLIAM F. KELLY

v.

PENNSYLVANIA RAILROAD COMPANY,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued March 8, 1957

Before GOODRICH and HASTIE, *Circuit Judges*, and McILVAINE, *District Judge*.

OPINION OF THE COURT.

(Filed May 16, 1957)

By GOODRICH, *Circuit Judge*.

This is an appeal by defendant from a judgment for plaintiff and from a district court refusal to enter summary judgment in its favor in an action brought under the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51 *et seq.*

Plaintiff was injured while working on the premises of the General Electric Company in West Philadelphia. He was hit by a locomotive which was moving some freight cars from one part of General Electric's yard to another. Plaintiff first sued General Electric upon the theory that it was a carrier subject to the Act. Defendant won this suit because it was found that General Electric was not a common carrier. *Kelly v. General Electric Co.*, 110 F. Supp. 4 (E. D. Pa.), aff'd per curiam, 204 F. 2d 692 (3d Cir.), cert. denied, 346 U. S. 886 (1953).

Then plaintiff sued the Pennsylvania Railroad on the theory that he was an employee of the Pennsylvania Railroad and, therefore, came under the Federal Employers' Liability Act, citing e.g. *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949). The trial court allowed the question to go to the jury asking that body whether it thought that plaintiff came within the spirit of the statute. This patently erroneous charge would be sufficient to call for a new trial. But because we think that on the undisputed facts plaintiff is not entitled to recover under the federal statute we shall not order a new trial but will instead direct the entry of judgment for defendant.

We have had in recent years two cases in this Court dealing with workmen who worked in the yard of a manufacturing plant and who were injured in the course of intrayard movement of freight cars. In each case we held that plaintiff was not the employee of a carrier subject to the Federal Employers' Liability Act. *Docheney v. Pennsylvania R.R.*, 60 F. 2d 808 (3d Cir.), cert. denied, 287 U. S. 665 (1932); *Shaw v. Monessen Southwestern Ry.*, 200 F. 2d 841 (3d Cir. 1953). In the *Shaw* case it was pointed out that the question involved was a mixed one of fact and law. The test for employment of one person by another is a legal test but what a particular employee was doing at the time of injury is a factual question. In the case before us there are no sharp disagreements upon the facts;

the disagreement is in the application of the facts. We shall take the facts most favorable to plaintiff in considering whether, by any possibility, the Pennsylvania Railroad is chargeable with the consequence of the accident to him.

1. In *Shaw* we pointed out that the place plaintiff worked and the equipment he used were exclusively the premises and property of Pittsburgh Steel Company and that the work he was doing at the time he was injured was that of the Steel Company.

That set of facts is repeated in the case before us. Kelly worked on General Electric premises. The work he was doing at the time he was injured was fixing a switch which belonged to General Electric and he was hit by a General Electric locomotive operated by a General Electric crew. The train operation in which plaintiff was hurt was wholly within General Electric's property and for the benefit of General Electric.

2. In *Shaw* it was pointed out that plaintiff was paid by the industrial employer and not the railroad for his work on the day he was injured. The same is true here.

3. In *Shaw* plaintiff sometimes worked for and was paid by the railroad, was assigned to his work in the industry yard by a railroad employee, was covered by a collective bargaining contract signed by the industry and the railroad, and had tenure and seniority benefits as a railroad employee. Kelly was hired by General Electric and had no such connections with defendant railroad.

4. In *Shaw* it was pointed out that the work plaintiff was doing was in charge of the industrial employer, not the railroad.

We thought that very important in the *Shaw* case and think it is here also. Kelly was directed by foremen of

General Electric. He was instructed in his duties as a laborer by a General Electric fellow employee. It is true that once he salted a frozen switch at the request (or direction) of a railroad employee and on two, maybe more, occasions he was directed to pick up debris by a railroad employee. However, the principal part of his job with General Electric was to pick up debris and in performing this assignment he was doing the work of General Electric not the railroad.

As one reads the record in this case and goes back again over the two cases last cited it seems clear to us that this case has less pointing to railroad employment than did either of the others.

Plaintiff suggests that the operation of the General Electric private yard could only be done by a common carrier and, therefore, General Electric must have been functioning as an agent of defendant. From this he concludes that plaintiff was an employee of defendant for purposes of the Federal Employers' Liability Act. Compare *Pennsylvania R. Co. v. Barlion*, 172 F. 2d 710 (6th Cir. 1949), with *DelVecchio v. Pennsylvania R.R.*, 233 F. 2d 2 (3d Cir.), cert. denied, 352 U. S. 909 (1956). The arguments suggested give credit to the ingenuity of counsel but we do not find them helpful in clarifying the case. We are told that in 1923 and 1924 the railroad got permission from the City of Philadelphia to lay tracks across 68th Street, then a dedicated but unopened public highway, "to and into" the General Electric plant. This same argument, in a somewhat different way, came up when plaintiff sued General Electric, 110 F. Supp. at 7, 8. We do not see its signficance. If it ever had any it was lost because by ordinance in 1926 this portion of 68th Street was stricken from the City plan.

Then plaintiff says that by a statute of 1851 connection between defendant railroad and General Electric's private plant railroad was forbidden and, therefore, the plant railroad must have been part of defendant's common carrier

system.[1] If plaintiff's interpretation of this statute means that it was illegal for the railroad to operate facilities connecting with General Electric's private facilities, the argument proves too much. Both Pennsylvania statutes[2] and the federal Interstate Commerce Act[3] recognize the existence of lateral railroads and private sidetracks and require common carriers to connect with them.

The movement of freight cars within an industrial plant is not carrier car service but the operation of a plant facility. *United States v. Wabash R.R.*, 321 U. S. 403 (1944); *New York Central & H.R.R. v. General Electric Co.*, 219 N. Y. 227, 114 N. E. 115 (1916), cert. denied, 243 U. S. 636 (1917). The former suit by plaintiff against General Electric established that the intraplant movement of these cars was not common carriage. We have no doubt of the soundness of that conclusion.

If there were points of substantial dispute on the facts, this case would have to go back for retrial and proper instructions. We believe we have been careful not to interfere with the fact-finding function of the jury on any dis-

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1. The statute relied on is found in PA. STAT. ANN. tit. 67, § 363 (Purdon 1930) which provides:

"Connection of private with public railroads prohibited

"It shall not be lawful for any private individual, or association of individuals, or any company or companies, to construct a private railroad connecting with any railroad authorized to be constructed by the laws of this state, with the Ohio and New York state lines, or with any railroad constructed or to be constructed in the states of Ohio and New York; and it shall not be lawful for any railroad company authorized by the laws of this state to connect with any such private railroad; and any violation of the provisions of this act shall subject all individuals or association of individuals violating the same, to the jurisdiction of the courts of this state, and to such forfeiture as the legislature may hereafter direct. (1851, April 15, P. L. [1852] 720, § 7.)"

2. PA. STAT. ANN. tit. 66, § 1176 (Purdon 1941); *Id.* tit. 67, §§ 472, 781 *et seq.* (Purdon 1930).

3. 49 U. S. C. A. § 1(9).

puted question here. We believe that on facts most favorable to plaintiff it is clearly established that he was not an employee of the Pennsylvania Railroad, was not doing its work at the time he was injured and he has no claim against the railroad under the Federal Employers' Liability Act.

The judgment will be reversed and the case remanded to the district court with instructions to enter judgment for defendant.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded to the District Court with instructions to enter judgment for the defendant.

Attest:

IDA O. CRESKOFF,
Clerk.

May 16, 1957.

ORDER SUR PETITION FOR REHEARING.

Present: GOODRICH and HASTIE, *Circuit Judges,* and McILVAINE, *District Judge.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By THE COURT,

GOODRICH,
Circuit Judge.

Dated: July 8, 1957.